



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Delta Systems, Incorporated--Reconsideration

File: B-232235.2

Date: September 23, 1988

DIGEST

Request for reconsideration is denied where protester does not show any error of fact or law in prior decision.

DECISION

Delta Systems, Incorporated requests that we reconsider our decision in Delta Systems, Incorporated, B-232235, Aug. 18, 1988, 88-2 CPD ___, wherein we dismissed its protest of an award under request for proposals (RFP) No. N00039-87-R-0317, issued by the Space and Naval Warfare Systems Command, Department of the Navy, for technical support services.

We deny the request for reconsideration.

Delta submitted a proposal for the RFP set aside for small business but, as a result of a protest by another bidder to the Small Business Administration (SBA), Delta was held to be other than small, and therefore, was disqualified from the competition. SBA's determination was based upon its finding that Delta's use of Syscon Corporation, a large business subcontractor, violated Federal Acquisition Regulation (FAR) § 52.219-14 (FAC 84-31), which requires that 50 percent of the cost of performance incurred for personnel must be those of the small business. The SBA also determined that Syscon filled a "critical void" for the performance of the contract, and in doing so became an "ostensible subcontractor" and "joint venturer" with Delta in violation of 13 C.F.R. § 121.3(a)(vii)(C).

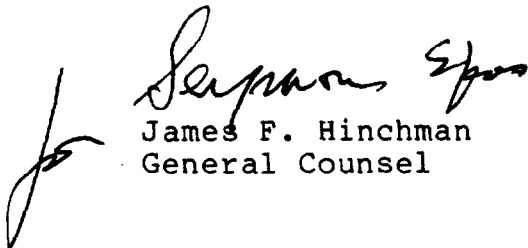
The Navy included in the RFP a clause entitled "Performance of Work by the Large Business Subcontractors," which in relevant portion, prohibits large business subcontractors from performing work in excess of 50 percent of the total amount of work under the contract. The Navy did not include FAR § 52.219-14.

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In its original protest, and again on reconsideration, Delta contended that if the Navy had included FAR § 52.219-14, the correct provision specifying the limitations on subcontracting with large businesses, instead of the clause that it did insert, Delta would have structured its proposal to comply with the proper limitations and, therefore, would not have been disqualified by the SBA.

While this may be true if the SBA determination was based upon factors which were controlled by the differences between the inserted clause and the FAR, this is not the case at hand. In our prior decision, we dismissed Delta's protest of the failure of the Navy to include the FAR clause in the solicitation precisely because the SBA size determination stated that the offeror, Delta, was ineligible for award, regardless of whether the FAR clause was applicable. Delta was disqualified because Syscon, the large business subcontractor, was an "ostensible subcontractor" and "joint venturer" with the offeror as prescribed by the SBA's regulations. This particular regulation has been in force for a number of years prior to the issuance of this RFP. Consequently, since Delta was on constructive notice of this regulation, see Federal Crop. Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947); Data Processing Services, B-225443.2, Dec. 18, 1986, 86-2 CPD ¶ 683, Delta's purported complete reliance on the RFP provisions in structuring its subcontractor arrangement was unreasonable. Since the SBA decision relied upon the "ostensible subcontractor" rule and not on the FAR clause, Delta was not prejudiced by the Navy's failure to include FAR § 52.219-14 in the solicitation. Further, the SBA has the conclusive statutory authority to determine matters of small business size status for federal procurements and our Office does not review those determinations. Hornes Motor Lodge, B-225688.3, Oct. 15, 1987, 87-2 CPD ¶ 361.

Since the protester has only reiterated arguments made in its initial protest, and has not shown that the General Accounting Office has made any errors of fact or law in our prior decision, its request for reconsideration is denied.



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General Counsel